The Central Law Journal.

ST. LOUIS, MARCH 16, 1883.

CURRENT TOPICS.

A valued correspondent points out the following conflict of authority on the citizenship of parties to suits in the Federal courts:

In Poppenhauser v. India Rubber Co., reported in 14 Fed. Rep. 407, Judge Wallace decides, "that for the purposes of the courts of the United States, domicile is the test of citizenship;" or, in other words, as stated by him in the opinion, if plaintiff, although not an alien, she having removed to Germany and living there when the suit was instituted, the cause was removable. While residing in the United States plaintiff was a citizen of the State of New York, and so were defendants.

The judiciary act of Congress conferring jurisdiction of the courts of the United States, requires different citizenship of parties, which is now construed by Judge Wallace to mean only residence or domicile of parties. A case referred to by the learned judge is Lanz v. Randall, 4 Dill. 425, decided by Justice Miller, and directly in point, only with this difference, that the conclusions reached by Justice Miller are exactly the opposite of those of Judge Wallace. In the latter case, Lanz was a native of Germany, was at the time of the institution of the suit, and had been for fifteen years prior thereto, a resident of Minnesota; had declared his intention to become a citizen, and renounced his allegiance to the German Empire; had, under the laws of Minnesota, legally voted and was entitled to hold any office in the State, but had never been naturalized under the laws of the United States. The court held that he was still an alien, and could sue citizens of Minnesota in the Federal courts. In the case decided by Judge Wallace, the plaintiff was the wife of a citizen of the United States, who resided in New York, and was therefore a citizen of New York. In 1871 plaintiff and husband removed to Germany, where they have resided ever since, and that their future residence depended on the exigencies of business, plaintiff's husband frequently returning to New York and spending considerable time there. Defendants were citizens of New York, and removed the cause from the State court to the Federal court, and on motion to remand, the learned judge held the cause properly removable. How can this decision be reconciled with that of Justice Miller in 4 Dill. 425? The one holds that the only question to be decided is that of citizenship, regardless of residence or intention; the other holds that residence is the proper test, but both concur that the United States court has jurisdiction.

We print in another part of this issue two articles upon the general subject of the entirety of contracts for personal services, citing cases which escaped us at the time the "CURRENT TOPIC" contained in the issue of February 16 was written. Other subscribers have also called our attention to these omissions, and one to some Indiana cases which, though in point, are cited in neither of the articles mentioned. Ricks v. Yates, 5 Ind. 115; Yeally v. Miscal, 5 Ind. 142.

The scarcity of substantial citizens on the average jury has frequently puzzled attentive observers of the practical workings of our judicial system. This mystery has been dissipated in New York City by the recent discovery of the existence of a jury ring formed of a few persons holding subordinate positions in the office of the Jury Commissioner, by the operations of which any person paying for the privilege could secure immunity from jury duty. Considering the character of juries which are common to all our great cities, it is not likely that New York is alone in the possession of such corrupt officials, or of a class of business men who are willing to descend to such means to escape a public duty. The practical workings of the system of selecting jurors should be subjected to habitual scrutiny by those specially interested in the administration of justice. Meanwhile, the fact that in any community can be found a sufficient number of "business men" who are willing to use such corrupt means to avoid the performance of a civic duty, is a commentary upon the public morals of the class, who are frequently so glib upon the alleged short-comings of the legal profession.

THE ADMISSIBILITY OF EVIDENCE OF CHARACTER IN CIVIL ACTIONS.

What Character Is.—The term "character," as employed in this article, is not synonymous with "disposition;" it means "reputation," or the general opinion found by the public in their intercourse with the party whose character is in dispute. Therefore, a witness who is called to testify regarding the character of a person, must not give the jury the result of his own experience and observation; he must, strictly speaking, confine himself to evidence of mere general repute.[1] But he may testify that he has heard "him very little talked about;"[2] or that he has "never heard anything said against his character."[3] And some of the judges have even gone so far as to declare that such evidence is the best evidence that can be offered.[4]

General Rule.—The general rule is, that evidence of character is inadmissible unless it is involved in the issue.[5] The issue may be entirely upon the question of the defendant's liability; it may be upon the question of damages; or it may be upon both questions. But we will find, generally, that wherever the evidence is admissible for any purpose, it will be received only in mitigation of damages. It may entirely defeat the plaintiff's action; it may show that the injury to him was so slight that it would have been better had he remained out of court altogether.

1 Rex v. Rowton, 34 L. J. (M. C.) 57; L. & Care, 520; 10 Cox, 25.

2 Rex v. Rowton, *supra.*

3 10 Cox, 25.

4 Ibid.

5 1 Phillipps on Evidence (14th Am. ed.), 757; 1 Greenleaf's Evidence (12th ed.), 76; 2 Starkie's Evidence, 366; 1 Wharton's Evidence, 47; Earl of Leicester v. Walter, 2 Camp, N. P. C. 251; Bostick v. Rutherford, 4 Hawks (N. C.), 83; Martin v. Hardeley, 27 Ala. 458; Rodringues v. Tadmire, 2 Esp. 722; Downing v. Butcher, 2 M. & R. 374; Newsome v. Carr, 2 Starkie's R. 69; Cornwall v. Richardson, Ry. & M. 305; Givens v. Bradley, 3 Bibb, 192; Ruan v. Perry, 3 Caines, 120; Attorney-General v. Bowman, 2 B. & P. 532, note; Nach v. Gilkerson, 5 L. & R. 351; Anderson v. Long, 10 Ib. 55; Gregory v. Thomas, 2 ibb, 286; Goodright v. Hicks, Buller's N. P. 296; Pettingill v. Dinsmore, Davies R. 208, 214; Fowler v. Ins. Co., 6 Cow. 675; Pratt v. Andrews, 4 Comst. 493; Gough v. St. John, 16 Wend. 653; Woodruff v. Whittlesey, Kirby (Conn.) 62; Humphrey v. Humphrey, 7 Conn. 116; Morris v. Hazelwood, 1 Bush (Ky.), 208; Tenney v. Tuttle, 1 Allen, 185. 187; Schmidt v. Ins. Co., 1 Gray, 529; McDonald v. Larvy, 110 Mass. 49.

Character as a Strict Defense.—When character forms the inducements to an agreement, it is involved in the issue; and the want of a good reputation in the plaintiff affords the defendant a complete justification in rescinding the contract, the breach of which is complained of. A master may have employed a servant, in utter ignorance of his bad character; and to retain the latter in his employment might work irretrievable injury to his business. Or, as is sometimes the case, a person may have promised to marry a woman without any suspicion of the reputation which she bore. In such a case, all he need produce is satisfactory proof of that reputation and his ignorance thereof at the time of the promise, and he will be entirely relieved from his obligation.[6] But he must show, also, that he abandoned her as soon as he became acquainted with the fact he sets up in defense. For if he made the promise with full knowledge of her reputation, or if he has continued his intimacy after it has been disclosed to him, he must be considered as having concluded to take her "with all her faults."

Breach of Promise and Seduction.—In actions for breach of promise as well as for seduction of the plaintiff's daughter or servant, or for criminal conversation with the plaintiff's wife, the defendant may impeach the woman's character for chastity in mitigation of damages. But such evidence must be confined to proof of the woman's reputation as it was at the time of and previous to the alleged seduction or adultery; for it may be that it was this very act of indiscretion which weakened her principles and brought her down to the degraded condition wherein her immoralities have become offensive to the public and created the reputation which she bears. The law would surely not permit an unprincipled man to accomplish the ruin of a woman and then avail himself of the bad reputation thereby created; to permit him to urge it in his favor and against the plaintiff, would not only be unjust but absurd.[7] But he may

6 Foulkes v. Selway, 3 Esp. 236; Irving v. Greenwood, 1 C. & P. 350; Bush v. Merritt, 1 Car. & K. 463; Boynton v. Kellogg, 3 Mass. 189; Palmer v. Andrews, 7 Wend. 142; Morgan v. Yarborough, 7 La. Ann. 416; Van Scorch v. Griffin, 5 Ib. 416; Berdelly v. Mortlock, Holt, 151.

7 Foulkes v. Selway, *ubi supra*; Boynton v. Kellogg, 3 Mass. 189; Leeds v. Cook, 4 Esp. 256; Elsam v. Faucett, 2 Ib. 563; Verry v. Watkins, 7 C. & P. 306; Bate v. Hill 1 Ib. 100; Pratt v. Andrews, 4 N. Y. 493.

show prior acts of indiscretion on her part;[8] and in an action for adultery with plaintiff's wife, the defendant may show the notorious profligacy and infidelity of the plaintiff himself, in mitigation of damages;[9] but not that he was reputed to be a common drunkard, nor that his house had a bad character.[10]

In these actions the plaintiff claims damages by reason of the injurious consequences of the defendant's act. In breach of promise cases, she claims that her feelings have been injured and that her reputation has sustained a severe shock. In seduction and criminal conversation, he claims that he and his family have been disgraced and his domestic happiness destroyed, and asks to be compensated for the pain thereby caused him. Therefore it may be shown in the former cases, that the plaintiff had no feelings which would be particularly shocked, and no reputation which could be seriously affected by the act of the defendant of which she complains; in the latter case, that the plaintiff had already been disgraced and robbed of his happiness. The damages must be commensurate with the pain endured, which will vary as the character of the woman seduced has been previously unblemished or profligate. And it makes no difference whether the defendant was acquainted with her previous reputation or not.[11]

Malicious Prosecution and False Imprisonment.—Whether the defendant, in actions for malicious prosecution and false imprisonment (where the gist of the plaintiff's action is his arrest without warrant), may offer evidence of the bad character of the plaintiff to support his justification, is a point which has been much controverted; but the weight of authority is decidedly in favor of the admissibility of the testimony, at least in the former class of actions. On the one hand it is strenuously urged that the defendant had no right to rest his suspicions upon the character which the plaintiff may have borne, but should have based them entirely upon the suspicious circumstances which were disclosed to him by the peculiar time, place and manner at and in which the *corpus delicti* was done; and further, that he had no greater right to permit the plaintiff's previous record to influence his suspicions, than a jury has to receive evidence of prior offenses of the accused in a criminal case.[12] On the other hand, it is contended that not so many suspicious circumstances are required to create a reasonable suspicion in the mind of a prudent man or officer where the plaintiff is a man of bad character, as would be, if he bore a good reputation among his neighbors.[13] By these same cases, and by the same course of reasoning as employed in actions for libel and slander, as we shall hereafter see, the defendant is permitted to impeach the plaintiff's character in mitigation of damages.[14]

But such evidence must be confined to the reputation of the plaintiff, as it was at the time the alleged malicious prosecution was begun or the arrest made, as it may be that this very act of the defendant destroyed the plaintiff's good name. So, if the evidence be offered to support the justification, the defendant must show that he was fully acquainted with his previous reputation and that it contributed to strengthen his suspicions; for, otherwise, it would have made no difference how bad the plaintiff was reputed to be, if the defendant knew nothing about him.[15] So, witnesses, who have formed their opinions of the plaintiff's reputation since the commencement of the alleged malicious prosecution or the making of the arrest, are incompetent; cumulative evidence must be at least of as high a quality as that demanded of the defendant himself.[16]

Libel and Slander.—Whether evidence of the plaintiff's bad character may be introduced by the defendant in actions for libel or slander in mitigation of damages, is a question which has occasioned much controversy. On the one hand, it is urged that it would be unjust to admit such evidence, insomuch as it would compel the plaintiff, while seeking compensation for a specific injury, to prove an uniform propriety of conduct during his

8 Elsam v. Faucett, *supra*.
9 Bromley v. Wallace, 4 Esp. 237.
10 Norton v. Warner, 9 Conn. 172.
11 Verry v. Watkins, 7 C. & P. 306.

12 Newsome v. Carr, 2 Starkie's R. 69; Gregory v. Thomas, 2 Gibb, 286; Downing v. Butcher, 2 M. & R. 374.
13 Rodringues v. Tadmire, 2 Esp. 722; Bacon v. Towne, 4 Cush. 217; Bostick v. Rutherford, 4 Hawks, 83; Martin v. Hardely, 27 Ala. 458; Shannon v. Spencer, 1 Blackf. 527; Byrket v. Monahan, 7 Ib. 83; Blizzard v. Hayes, 46 Ind. 166.
14 See limitation in Smith v. Hyndeman, 10 Cush. 554.
15 Rodringues v. Tadmire, *supra*.
16 Ibid.

whole life, and would give the defendant, under pretense of mitigating the damages, the opportunity of continuing and aggravating the original calumny; that if it were admissible, every man might fall a victim to a conspiracy to ruin his name, even by the very suit which he should bring to free himself from the effects of a malicious slander; that timid men would not dare to vindicate their characters, and thus libellers would enjoy a dangerous impunity. [17]

To this it is replied, that every man who demands compensation for the ruin of his good name, ought to be prepared to repel any attack upon it; that the dangers arising from the admission of such testimony are entirely imaginary, since every witness is bound to disclose, on cross-examination, the grounds of his belief; that, as any failure in the evidence would tend to increase the damages, defendants would be extremely careful in offering such evidence; that the law can not presume the existence of criminal combinations, nor frame its rules to suit the conveniences of unreasonable timidity; that to ascertain the amount of damages done to the plaintiff's name, the jury must first know who he is and in what esteem he is held by his neighbors; that they can best attain this end by having the opinions of men personally acquainted with him. [18] And it makes no difference that the defendant has pleaded the truth of his charge in justification, and failed to substantiate it. [19]

But, as in malicious prosecution, the defendant must confine himself to the previous reputation of the plaintiff, and to his reputation for moral worth, or in regard to the particular trait against which the defendant directed his attack by his slander. Thus if the libel charged the plaintiff with theft, the defendant might show his reputation for moral worth and integrity; [20] but not that he was reputed to be a drunkard or a profligate; [21] for a man may be never so objectionable in these latter respects, yet he may be as honest a man as lives. Were it otherwise, some of our most prominent men would be continuously subjected to assault. So particular facts can not be shown to damage the plaintiff's character. [22]

Trespass.— In an action of trespass, the admission of evidence of the plaintiff's bad character, [23] has been successly resisted. In Bruce v. Priest, [24] where the point came directly before the court for decision, Bigelow, C. J., said: "The fact that a man bears a bad reputation or keeps company with persons of evil repute furnishes no palliation for doing violence to his person. He may forfeit the good opinion of his fellow man; he may become the object of pity and contempt by reason of his evil habits and associations, and want of moral worth, but we know of no principle of law or ethics, whereby full indemnity is to be denied to him for a violation of the sanctity of his person."

"The general rule is so well settled that authorities need not be cited to prove it, that a party can *only* give evidence of the good character of himself, his wife, daughter, servant or witness, *in* answer to impeaching evidence on the other side." [25] It would be manifestly improper to permit a party suing for damages to put in evidence of the character of himself or the party under whom he claims. First, the law presumes all characters to be good; it assumes all reputations to be unsullied; and it would be useless to prove a fact already assumed. Secondly, The plaintiff might thereby provoke an issue which the defendant had no intention to raise. [26] But the courts of Illinois, Indiana and North Carolina have held otherwise. [27]

[17] Jones v. Stevens, 11 Price, 374; Cornwall v. Richardson, Ry. & M. 305; Taylor on Evidence (7th ed.), 327.

[18] Earl of Leicester v. Walter, 2 Camp. N. P. C. 251; Williams v. Callender, Holt, N. P. R. 307; Bennett v. Simkins, 24 Ill. 264; Iwall v. Brooks, 23 Ib. 575; Wade v. Wall, 23 Ib. 426; Larned v. Buffinton, 3 Mass. 552; Walcott v. Hall, 6 Ib. 517; Ross v. Lapham, 14 Ib. 278; Bradwell v. Swan, 3 Pick. 378; Stone v. Varney, 7 Met. 86; Watson v. Moore, 2 Cush. 133; Orcutt v. Ramey, 10 Ib. 183; Leonard v. Allen, 11 Cush. 241; Buford v. McLuney, 1 Nott. & McCord, 261; Sawyer v. Elfert, 2 Ib, 511; King v. Waring, 5 Esp. 14; —— v. Moor, 1 M. & S. 284.

[19] Foot v. Tracy, 1 Johns. 45; Paddock v. Salisbury, 2 Cow. 811.

[20] Leonard v. Allen, 11 Cush. 241.

[21] Ibid.

[22] 1 Greenleaf on Evidence, 75.

[23] Bruce v. Pierce, 5 Allen, 100; Russell v. Davenport, 5 Day, 145.

[24] *Supra.*

[25] Bronson, J., in Pratt v. Andrews, 4 N. Y. 493.

[26] Bamfield v. Massey, 1 Camp. 460; Dodd v. Norris, 3 Ib. 519; Bate v. Hill, 1 C. & P. 100; Kentland v. Bassett, 1 Wash. C. C. 144; Cochran v. Tober, 19 Minn. 385; Goldsmith v. Packard, 37 Ala. 142; Houghtaling v. Kilderhouse, 1 Conn. 530.

[27] Israel v. Brooks, 23 Ill. 575; Shannon v. Spencer, 1 Blackf. 526; Byrket v. Monahon, 7 Id. 83; Howell v.

When is character involved in the issue? To attempt to answer this question, in a general way would be impossible; each case must be decided upon its own circumstances. The only satisfactory manner in which the practical application of the rule may be seen, is by a reference to a few of the cases. Where the plaintiff claimed that the defendant knew a debtor to be insolvent, and the issue turned upon that question, the former was permitted to prove that the debtor was reputed to be doing a ruinous business;[28] to be a bad manager;[29] inattentive to business;[30] to be intemperate, to indulge in unnecessary expense, and waste his time in frivolous pursuits.[31] So the defendant was permitted to show that the debtor bore a good reputation in his place of business;[32] his pecuniary standing among his neighbors and those doing business with him;[33] and that he was reputed to be a man of large property.[34] In all these cases the evidence was offered for the purpose of fastening knowledge upon the defendant of the insolvency, or to rebut the charge that he had knowledge of it.

But a defendant to support his plea of payment, can not show that he was reputed to be a man of wealth;[35] nor can the plaintiff, to rebut the same plea, prove the reputed poverty of the defendant.[36] So where the plaintiff sought to prove the exercise of due care on his part, by evidence of his previous reputation for careful driving, it was rejected.[37] So, also, where the defendant, to explain the plaintiff's possession of the notes declared on, offered evidence of his own reputation for carelessness, it was refused admission.[38] But where the defendant alleged that the plaintiff was drunk on several occasions in Michigan, the plaintiff was permitted to prove his reputation for sobriety in that State.[39] So where the plaintiff claimed that the defendant was fully aware of the drunken habits of a servant, he was permitted to show his reputation for drunkenness.[40] And it seems to be the general rule that, in all actions where the defendant is charged with the selection of incompetent servants, the plaintiff may always offer evidence of the servants' general character for drunkenness or carelessness, for the sole purpose of fastening knowledge of the habits of the servant upon the defendant or its agents.[41]

So where the defendant claimed that the libel was a privileged communication, the plaintiff having been his servant, the latter was permitted to show his previous good character, to establish the existence of malice in the defendant.[42] So where the plaintiff sued for an assault committed upon him on board ship, the defendant was allowed to expose the plaintiff's character and conduct during the entire voyage, to support his plea that he had punished him by virtue of his authority as master.[43] So where the defendant had pulled down his own house, into which the plaintiff had obtruded himself, the defendant was permitted to establish his good motives to show that the plaintiff was a notorious vagabond and nuisance.[44]

But where the plaintiff charged the defendant with breaking and entering her close, for the purpose of ravishing her, he was not allowed to impeach her character for chastity, to show that he had entered with her consent.[45] So, in *assumpsit* for the value of medical services, the defendant could not impeach the plaintiff's character as a physician, though his object was simply to prove, by that means, the worthlessness of the services rendered.[46] So where a testator was of weak mind, and it was proved that one of his sons

Howell, 10 Ired. L. 82; Burton v. March, 6 Jones L., 409. See also Bennett v. Hyde, 6 Conn. 24; Rognayne v. Duane, 3 Wash. C. C. 246.

28 Denny v. Dana, 2 Cush. 160; Lee v. Kilburn, 3 Gray, 594.

29 Bartholemew v. McInstry, 6 Allen, 657.

30 Simpson v. Carleton, 1 Allen, 109.

31 Alden v. Marsh, 97 Mass. 160.

32 Bartlett v. Dennett, 4 Gray, 111; Carpenter v. Leonard; 3 Allen, 32; Whitaker v. Shattuck, 3 1b. 319.

33 Haywood v. Reed, 4 Gray, 574.

34 Metcalf v. Munroe, 10 Allen, 491.

35 Hilton v. Scarborough, 5 Gray, 422; Veazie v. Homer, 11 Gray, 396; Atwood v. Scott, 99 Mass. 177.

36 Waugh v. Riley, 8 Met. 290. See also Abercroombie v. Sheldon, 8 Allen, 532; Trowbridge v. Wheeler, 1 Allen, 162; Commonwealth v. Stebbins, 8 Gray, 492.

37 McDonald v. Savoy, 110 Mass. 49.

38 Perry v. Gray, 101 Mass. 206.

39 Flint v. Hubbard, 1 Allen, 252. Compare McCarthy v. O'Leary, 118 Mass. 509.

40 Gilman v. Eastern R. Co., 13 Allen, 433.

41 Chapman v. R. Co., 55 N. Y. 579; Huntingdon Ry. v. Decker, 82 Pa. St. 119; Lee v. Detroit Bridg & Iron Co., 62 Mo. 565.

42 King v. Waring, 5 Esp. 13; Rogers v. Clifton, B. & P. 587 See Brine v. Bazalgat, 3 Ex. R. 692.

43 Pettingill v. Dinsmore, Davies R. 208.

44 Rhodes v. Bunch, 3 McCord, 66.

45 Davenport v. Russell, 5 Day, 145. See also Pier v. Myrick, 1 Devine, 345; Sidelinger v. Bucklin, 64 Me. 371.

46 Jeffries v. Harris, 3 Hauks, 105.

had influenced him to bequeath very little of his property to M, another son, because, as he represented, M's wife was extravagant, evidence of her character was admitted.[47]

It was at one time seriously and strenuously contended that when a party is charged with the commission of a criminal act, in a civil action, his character becomes involved in the issue; and, therefore, that the rule, permitting the defendant in a criminal case, to repel the presumption of guilt, which the proof produced by the prosecution has raised against him, not by counter proof, but by evidence of his previous good character, should be extended to actions prosecuted by the party directly inferred to obtain pecuniary redress.

It will suffice to say that the only case where this extension was ever directly permitted is Ruan v. Perry,[48] decided in 1803, by the Supreme Court of New York. The defendant was charged with fraud in detaining a vessel; but the only evidence produced to substantiate the charge was of a very circumstantial nature. The defendant, to show that he was incapable of doing the act imputed to him, appealed to his "fair and good reputation;" and thecourt, in holding the evidence admissible, said: "When a man is charged with fraud, upon mere circumstances, his character becomes involved in he issue." Professor Greenleaf, in his admirable treatise on Evidence,[49] indorses this decision, and labors under the impression that Ruan v. Perry, was afterwards impliedly approved by the same court in two other cases.[50] But it has long since been repudiated and overruled by the courts of New York.[51]

So the evidence has not been admitted in prosecutions for penalties for violating the revenue laws;[52] nor in actions for assault and battery;[53] nor in trespass for burning the plaintiff's dwelling house;[54] nor in *assumpsit* where the defendant charged the plaintiff with having burned his own house for the purpose of defrauding the defendant, an insurance company;[55] nor in several cases where fraud was charged.[56] The subject has been so ably and exhaustively discussed and examined by the Supreme Court of Kansas, in the case of Simpson v. Westenberger, recently decided,[57] that any further examination of the cases is unnecessary.

It must be admitted at first impression that it seems to be a very inconsistent rule which would permit a defendant in an indictment for rape, to show that the complainant had a bad character, and that his character was good, in order to make it appear that she was just such a woman as would most willingly yield to the prisoner's embraces, and that he was not the man to do such an act as the one imputed to him, and yet would exclude that same evidence when offered by the same defendant, in an action brought by the same woman for the same alleged assault. Yet it is a sufficient answer to say that the rule had its origin at that period of the history of our mother country when more than one hundred offenses were punishable with death, attended by corruption of blood and forfeiture of estate. We can not affect surprise at the grant of this indulgence to men whose lives were so frail, whose whole estate might be forfeited, whose wives and children might he made homeless and penniless, and disgraced, by the false testimony of even mistaken witnesses.

Evidence of character, at its best, is but mere expression of opinion, easily obtained add manufactured, and generally colored and exaggerated by passion and prejudice. It might be used so suddenly that it would have its effect before the other side could rebut it by counter proof, as they are always entitled to do. Trials would become long and tedious, the main issue would be forgotten, the character of bad defendants might be so burnished as to completely surprise the plaintiff, and

47 Deitrick v. Deitrick. 5 S. & R. 207; Masser v. Arnold, 13 Id. 323.

48 3 Caines, 120.

49 1 Greenlf. on Ev., 72.

50 Fowler v. Aetna Ins. Co., 6 Cow. 673; Townshend v. Graves, 3 Paige, 455.

51 Gough v. St. John, 16 Wend. 646; Pratt v. Andrews, 6 N. Y. 493.

52 A. G. v. Bowman, 2 B. & P. 532, note.

53 Givens v. Bradley, 3 Bibb, 195; Porter v. Seiler, 23 Pa. St. 424.

54 Gibhart v. Burkett, 57 Ind. 373; Thayer v. Boyle, 30 Me. 475.

55 Schmidt v. Ins. Co., 1 Gray, 529.

56 Atwood v. Dearborn, 1 Allen, 413; Heywood v. Reed, 4 Gray, 574; Nash v. Gilkerson, 5 S. & R. 352; Anderson v. Long, 10 Id. 55; Porter v. Webb, 6 Greenlf. 14; George v. Drummond, 7 Ind. 19; Morris v. Hazelwood, 1 Bush. 208; Gutzweiler v. Lackeman, 23 Mo. 178; Smets v. Plunkett, 1 Strobh. (S. C.) 372; McBeau v. Fox, 1 Bradwell, 187; Lecky v. Bloser, 24 Pa. St. 401; Lander v. Seaver, 32 Vt. 114.

57 Reported in 15 Cent. L. J.. 429.

destroy the effect of his evidence, though it could not be directly met; and, amidst the confusion necessarily brought about by the trial of such collateral issues, unjust verdicts would be rendered. While it is now too late to question the wisdom or expediency of the rule applied in criminal cases, we may well look upon this species of evidence with a jealous eye, and resist any further progress in its introduction.

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PART PERFORMANCE ENTIRE CONTRACT.

It would be a difficult and useless task to collate and review all the cases on the subject of part performance of contracts entire in their nature. The late decision of the Wisconsin court in Diefenback v. Stark,[1] is not without abundant authority; yet the question is by no means a well settled, but rather a much vexed one, and it is believed the Wisconsin court has overlooked many authorities for the more equitable rule following the lead of Britton v. Turner.[2] The case of Duncan v. Baker[3] was an action commenced in a justice court by Baker v. Duncan to recover $48.40, which he claimed to be due for fifty-nine days work. Duncan hired Baker to work for him seven months at $15 per month, and he worked only fifty-nine days, quitting the employment without reasonable excuse. A judgment for $19.90 and costs was affirmed. This case is cited and followed by the Supreme Court of Nebraska in Parcell v. McComber.[4] In this case McComber agreed to work for Parcell one year for $195, and quit the employment and brought suit for five months' wages before the expiration of the year. The court not only affirmed a recovery on general principles, but held that suit was not prematurely brought. This last point, however, on the ground that no time of payment was fixed in the contract, and the testimony justified the jury in finding that it was the understanding of the parties that the wages should be paid from time to time according to the needs of the defendant in error, and no claim of damage for non-fulfilment of the contract was made in the answer. The extreme hardship worked by the rule as laid down in the Wisconsin case and the cases followed by it is well illustrated by Lantry v. Parks,[5] cited by the court. In that case the plaintiff had worked ten and a half months, on a contract to work one year, and quit on a Saturday, declaring that he would work no longer, but returned on Monday and offered to work. The defendant said he would employ him no more. Upon suit brought it was held he could not recover anything. Many other authorities might be cited on all phases of the subject, and many of them as harsh and inequitable as the above, the reason given in all being the purely technical one, that the contract is an entirety and performance a condition precedent to the right to recover, when the condition was not waived; and as in these cases there could be no return of the labor performed, the defectively-constructed building which had attached to the freehold, or the wheat which had been converted into flour, etc., there had therefore been no voluntary acceptance of the part performance, no waiver of the condition, and it is plain that the delinquent must suffer a forfeiture. Yet if the employer refused to permit the contract to be completed, the clear right of action which then accrued to the employee, they all agreed, was subject to his inability to obtain other employment of a like kind and equally remunerative; when such employment was obtained, damage ceased to accrue. The converse of the proposition ought also to obtain; if the employer can secure, at once, other labor without additional expense, he has suffered no damage; the additional amount, over and above the contract, he is compelled to pay, being the measure of damage.[6] In Lantry v. Parks,[7] it must be admitted that the employer had a clear right of action against his employee for the damage which accrued by reason of his refusal to work the remaining month and a half. He could scarcely have the hardihood to attempt to enforce it; but suppose that he did, would the court have permitted the defendant to set up the part performance by way of recoupment or

1 14 N. W. R. 621.
2 6 N. H. 481.
3 21 Kan. 99; s. c., 7 Cent. L. J. 488.
4 11Neb. 209.
5 8 Cow. 63.
6 Peters v. Whitney, 23 Barb. (N. Y.) 24.
7 *Supra*.

counter-claim? It is difficult to understand how this could be refused, but more difficult to see how the right could be recognized without permitting an affirmative judgment in favor of the defendant, in those cases where the value of the service rendered exceeds the damage done the employer, and this is what the later cases contend for. Still another objection to the Wisconsin case and those it follows, is that they concede a right of action to the party not in default, but deny it to him who is guilty of the breach; thus visiting upon the delinquent, for his breach of a contract, a punishment beyond the direct pecuniary loss he has occasioned, and granting to the other something more than compensation.

There is a very respectable minority, if not the weight of cases, with the Kansas and Nebraska decisions.[8] And in Champlin v. Rawley,[9] the court wavered to a confession, that they maintained the rule not so much on principle as in obedience to the doctrine of *stare decisis*.

The better reason seems to be with the New Hampshire case. It is no hardship to require a man to pay the reasonable value of that which he receives and retains, even if he retains it from necessity, always protecting him, by permitting him to recoup his damage sustained by reason of the non-performance of the contract. This is equal and exact justice, and it matters little whether we call it law or equity, or how it is administered. The fact remains patent to the dullest mind that the part performance may be a substantial benefit, and if the courts refuse to enforce payment, it is a shock to the sense of natural justice.

A. G. SCOTT.

Lincoln, Neb.

[8] Field on Dam., secs. 327, 332, 334, 335 and note 24; Parsons on Cont. (6th ed.), *38, 39; Carroll v. Welch, 36 Tex. 149; 27 Miss. 305; Eppeily v. Bailey, 3 Ind. 73; 11 Vt. 560; Ryan v. Dayton, 25 Conn. 188; Lamb v. Brolaski, 38 Mo. 51, and the Iowa cases cited in 16 Cent. L. J. 121.

[9] 18 Wend. 187.

ENTIRETY OF CONTRACT FOR PERSONAL SERVICES.

Under the head of "Current Topics," in a recent number of the CENTRAL LAW JOURNAL,[1] is a reference to a decision of the Supreme Court of Wisconsin upon the entirety of contract as to personal services. This decision is important to the profession only so far as it settles the law for the State of Wisconsin, for the principle is certainly an open one in States whose Supreme Courts have not put the question to rest; the tendency of late years, at least, being to give to the employe a right to recover on a *quantum meruit* for services actually performed under a partially completed contract for a definite time.

Since the celebrated case of Britton v. Turner,[2] courts have been departing from the iron rule of entirety of contract as given in the Wisconsin case, in reference to personal services.

In the well-considered case of Duncan v. Baker,[3] the court decide: "Thus, where D hired B to work for him for seven months at $15 per month, and B worked for D only fifty-nine days, and then quit without any reasonable excuse therefor, held, that B may nevertheless recover from D for what the work was reasonably worth, less any damage that D may have sustained by reason of the partial non-fulfillment of the contract."

The court, in deciding the case, cite Parsons on Contracts,[4] where he says: "So, too, if one party, without the fault of the other, fails to perform his side of the contract in such a manner as to enable him to sue upon it, still, if the other party have derived a benefit from the part performance, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and, to recover that *quantum* of remuneration, an action of *indebitatus assumpsit* is maintainable."

The court, after quoting from Parsons, say: "Many authorities may be found to sustain the foregoing proposition of Mr. Parsons, and to sustain it in all its various aspects.

[1] 16 Cent. L. J., 121.
[2] 6 N. H., 481.
[3] 21 Kans., 99; 7 Cent. L. J. 488.
[4] 2 Pars. Cont. (6th ed.), 523.

Thus, authorities may be found to sustain it with reference to contracts of sale; contracts to do some specific labor upon real estate, as building or repairing houses, etc.; contracts to do some particular labor upon personal property, and contracts for personal services. The leading case which sustains the foregoing proposition with reference to contracts for personal services, is the case of Britton v. Turner.[5]

The court further say: "The weight of authority at the present time, we think, is unquestionably against the doctrine that where a contract is entire, and, consequently, not apportionable, and has been only partially performed, the failing party is not entitled to recover or receive anything for what he has actually done. It will, perhaps, be admitted that the doctrine has been overturned with respect to all contracts except those for personal services; and, if so, then there is not much of the doctrine left. But if the doctrine is to be abandoned with reference to all contracts except those for personal services, then why not abandon the doctrine altogether?"

Field, in his work on Damages, says: "The doctrine of Britton v. Turner, is also now fully, or partially recognized in Michigan, Wisconsin, Indiana, Illinois, Pennsylvania, Maine, Texas, Tennessee, Missouri, New York and some other States." "And the doctrine, in view of its manifest justice, is likely to grow in favor until it becomes universally recognized."[6]

Now, notwithstanding this, the Supreme Court of Wisconsin in Diefenback v. Stark,[7] step exactly in the way of the wheels of progress carrying the doctrine, and quoting Parsons,[8] say: "But in addition to the criterion laid down in the previous section, it is said in the note, which contains a very able review of the authorities and citations of many authorities to sustain the position, that contracts for service are not embraced within the rule laid down in the text." We are not aware that there are any cases upon contracts for service fully sustaining the proposition in the text, except the celebrated one of Britton v. Turner.[9]

Now, it must be admitted that there are but few direct citations of authorities in the case or Diefenback v. Stark, but the same court in a subsequent decision have cited the case with approval in Koplitz v. Powell,[10] in which last case only two citations are given to sustain the entirety of the contract for personal services.

Now, upon this doctrine of entirety of contract for personal services, the fountains of justice appear to be pouring out waters of different color, and the pool from which the legal fraternity refresh themselves, seems to be a little insipid, except in States where the Supreme power has shut off all but one stream.

VANSYCKEL & WELLS.

Girard, Kansas.

[5] 6 N. H., 481. The court there cites: Field on Damages, secs. 327, 332, 334, 335; 2 Pars. Cont. (6th ed.), * 38, 39; Pixler v. Nichols, 8 Iowa, 106; McClay v. Hedges, 18 Iowa, 66; McAfferty v. Hale, 24 Iowa, 356; Byerlee v. Mendel, 39 Iowa, 382; Wolf v. Gerr, 43 Iowa, 339; Hillyard v. Crabtree, 11 Tex. 264; Carroll v. Welch, 26 Tex. 149; Hollis v. Chapman, 36 Tex. 1, 5; Lamb v. Brolaski, 38 Mo. 51, 53; Ryan v. Dayton, 25 Conn. 188; Epperly v. Bailey, 3 Ind. 73; Field on Damages, sec. 334, note 24; 3 U. S. Dig., 1st series, p. 521, No. 2390.

[6] Secs. 334, 335.

[7] 14 N. W. R., 623.

[8] 2 Pars. Cont., sec. 523.

[9] 6 N. H., 481.

[10] 14 N. W. R., 831.

COMMON CARRIER — DISCRIMINATING TARIFF — RAILROAD POOLS — PUBLIC POLICY.

DENVER, ETC. R. CO. v. ATCHISON, ETC. R. CO.

United States Circuit Court, District of Colorado.

1. An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal.

2. Railroad companies have a right to unite in continuous lines for greater facilities in the transportation of goods and passengers, but any agreement that a railroad company shall at a certain terminus refuse or discriminate against freight which comes to it over other than its connecting line is void as against public policy.

Wells, Smith & Macon, for plaintiff; *Peck* and *Thatcher & Gast*, for defendant.

HALLETT, J., delivered the opinion of the court:

The duty of common carriers to give equal service on equal terms and upon reasonable compensation to all who may apply to them to carry persons or property is as well established as any rule of the common law. As to railroads, it is expressed in sec. 6, art. xv. of the Constitution of this State, in the following language: "All indi-

viduals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power."

As a rule of law, it must carry with it all that is essential to its due observance and enforcemant. It is good for what is fully expressed in it, and for all that may arise therefrom by necessary implication. Whatever is inconsistent with it, or with the purposes for which it was adopted, is against public policy, and can not be upheld. It is a rule of conduct for carriers which is designed to give the public the largest use of public conveyances which may be consistent with the service, and one which leaves to carriers only such powers as are necessary to the business. Thus the carrier may charge for his services, because he can not work without pay; but he is allowed only a reasonable price, such as will be fair compensation for his labor. He may exclude from his carriage explosive compounds which may be dangerous to other goods and the carriage itself. He may also exclude theives and gamblers and other mischievous persons who may be traveling for an unlawful purpose. These and the like things for the good of the service the carrier may do, but in general he must have regard for the public interest in all that he does; for, as said by the Supreme Court, "He is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned." New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 382; Munn v. Illinois, 4 Otto, 130.

If, then, a common carrier can set no limits to the service in which he is engaged, except such as are inherent in it, the position of the defendant in this controversy is made plain. The defendant refuses to carry to or from Denver and points between Denver and Pueblo, except in connection with the Rio Grande road, not absolutely indeed, but for the price charged in connection with that road. To say to the public that the rate shall be less by the Rio Grande road than by any other line, is, in effect, to say that the public shall use that road only. A very little difference in the tolls will prohibit traffic over other lines, and clearly enough such was the effect in this case. It is admitted that defendant refuses to carry in connection with complainant at the same rate of charges as with the Rio Grande Company, and that its charges for such carriage a much higher rate; for all practical purposes that course of proceeding amounts to a refusal to carry except in connection with the Rio Grande road.

In support of its refusal to deal with complainant as a connecting road, defendant avers that it has entered into a contract with the Rio Grande company for making a "through line," and doing "through business between the Missouri river and Denver, which is of great advantage to defendant, and which can not be maintained except on the theory of exclusive dealing between the parties thereto. So understood, the contract is open to the objection that it gives no choice of route to travelers and shippers of goods, of which something will be said hereafter. The answer, however, gives no intimation as to the true character of the contract as it appears in evidence. It is an agreement between the Union Pacific company of the first part, the defendant and its leased lines of the second part, and the Rio Grande company of the third part, for a division of territory and traffic in Colorado and New Mexico. At the time it was made, March 22, 1880, these companies owned or controlled all the railroads in Colorado and the northern half of New Mexico, and they assume in this agreement to divide the country and allot to each of the parties its separate portion for the purpose of building new railroads. The parties are severally bound not to trespass on the territory of other parties as defined in the agreement, and each stipulates with the other that it will not "voluntarily connect with or take business from or give business to, any railroad which may be hereafter constructed" in the territory of the other. And settling the question of new roads, the parties proceed to a division of traffic in paragraphs four, five and six of the contract, as follows:

Fourth. All traffic to and from the Missouri river, and all competitive local traffic, both passenger and freight, to and from the territory south and west of Denver, reached and covered by the Denver & Rio Grande Railway Company or the Denver, South Park & Pacific Railroad Company, and lines controlled or constructed or to be constructed by them or either of them, or promoted by and connecting with them or either of them, shall be pooled between the Union Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railroad Company, one-half to each, also all traffic to and from the Missouri river, and to and from competitive local points, both freight and passenger, to and from Denver, shall be divided three-quarters to the Union Pacific Railway Company, and one-quarter to the Atchison, Topeka & Santa Fe Railroad Company, each company in each case to deduct forty per cent. as cost of operating, it being understood and agreed that all local business, both passenger and freight, to and from the Denver, South Park & Pacific Railroad Company, east of and including Weston station, shall be treated as Denver business, and divided accordingly. It is also understood that the party of the third part is not to do any through business to and from Trinidad, or to and from New Mexico via Trinidad or El Moro.

Fifth. That as long as the parties of the second part, and each of them, shall keep the agreements on their behalf herein contained one-half of all the traffic, both passenger and freight, origina-

ting in Colorado, and also in New Mexico at points as far south as the party of the third part is authorized to build under art. 2 of this agreement, or coming or delivered to the party of the third part for transportation over any of the lines of the party of the third part, constructed or to be constructed or promoted by it, or coming or delivered to it for transportation from lines connecting with it and destined for points east of the line between Denver and El Moro, and said line extended northerly and southerly, shall be delivered at South Pueblo for transportation over the railroads controlled by the parties of the second part, and the other half at Denver for transportation over the railroads controlled by the party of the first part, as far as the party of the third part can legally control such traffic. It is further agreed that as to all traffic, both freight and passenger, interchanged between the party of the third part and the other parties hereto, to and from Denver via South Pueblo, and from and to South Pueblo via Denver, the party of the third part shall be entitled to and shall pro rate with the other parties at the rate of one mile and a half to one; that is to say, shall be entitled to and shall share in the distribution of such total fare and freight moneys for each mile of actual haul done by the Denver & Rio Grande Railway Company, as if the same were carried by it one mile and a half, but the allowance of extra mileage shall in no event exceed local rates, and, in case of any more favorable pro rata being given to the party of the first part, the same shall be given to the party of the second part. It is further agreed that the rates between South Pueblo and Leadville, and between South Pueblo and all other points west of Pueblo, shall be as low as between the same points and Denver, under any and all circumstances, and the party of the third part shall not discriminate against the parties of the second part, in respect of cars or other facilities for the transfer of freight and passengers.

Sixth. In order to enable the party of the third part to carry out its obligation under the above article and for its protection, it is further agreed that the parties of the second part shall, as long as the party of the third part shall keep the agreements on its behalf herein contained, deliver at South Pueblo, for transportation and traffic, passenger or freight, destined from points east of the said line of the party of the third part to points on its line constructed or to be constructed or promoted by it, or connected with it, in Colorado, and also in New Mexico to points on its line as far south as the party of the third part is authorized to build under art. 2 of this agreement, and shall not deliver to, or cause the same to be transported over or voluntarily receive the same from any other line or railroad in the territory named than that of the party of the third part, so far as the said parties of the second part can legally control the same. And that any agreement or understanding of the parties of the first and second parts with each other, or of both, or either, or any of them, with any competing railroad for a division of business, or territory, or earnings that might divert business which would otherwise, under this agreement, pass over the lines of the party of the third part, shall provide for securing to the party of the third part a proportionate benefit on the mileage basis, stated in art. 5, for not less than one-half of the southwestern and western business and one-fourth of the Denver business, as provided in art. 4 of this agreement, provided that this shall not prevent the party of the second part from making any agreement or understanding with the Atlantic & Pacific Railroad Company without incurring any liability to the party of the first or third parts."

Of this remarkable document it will not be necessary to speak at length in this connection. To do so would perhaps convey an impression that for some purposes these corporations have the powers which in this instrument they have assumed to exercise. It is enough to say that it is a conspiracy to grasp commerce and suppress the building of railroads in two great States. Similar provisions have fallen under the condemnation of other courts, whose judgment of them has been clearly expressed. In Hartford, etc. Co. v. New York, etc. Co., 3 Rob (N. Y.) 411, it was held that a provision in a contract forbidding one of the parties to extend its road would avoid the contract. An association of carriers to regulate the price of freight, with provisions prohibiting the members from engaging in similar business out of the association, has a tendency to increase the price of carriage and to suppress competition, and is therefore illegal. Stanton v. Allen, 5 Denio, 434; Hooker v. Vandewater, 418, 349.

The Rio Grande Company also agrees, in this instrument, "not to do any through business to and from Trinidad or to and from New Mexico via. Trinidad or El Moro," an express renunciation of a duty enjoined by the State, and therefore void. If that company can decline a part or all of the carrying business at Trinidad, it may also abandon its entire line and refuse to serve the public in any way. Shrewsbury, etc. R. Co. v. London, etc. R. Co., 4 DeG. M. & G. 415; s. c., H. of L. Cases, 113; State v. Hartford, etc. Co., 29 Conn. 538; Union Pacific Co. v. Hall, 1 Otto, 343.

A more objectionable feature of this instrument is that in which the parties agree not to "connect with or take business from or give business to any railroad" which may be constructed in Colorado or New Mexico after its date. That is to say these powerful corporations having secured a monopoly of the carrying business in two States will hold it indefinitely and refuse to recognize or deal with any rival that may enter the field. Argument is not necessary to show that a compact of this kind is against public policy and therefore void. Certain corporations of Pennsylvania controlling coal produced in a large district of country, made a combination to regulate the supply and the price,

which was held to be illegal. Morris Run Coal Co. v. Barclay Coal Co., 38 Penn. St. 173. In this instance the combination is to control the carrying trade of a great country which is of much greater importance to the people than coal.

It is believed, however, that the true principle mentioned at first should control without reference to any compact or agreement, valid or otherwise, that may have been made. The carrier service is subject only to conditions and limitations necessary to its existence, and not such as the carrier himself may impose from motives of gain or other purpose. If the defendant may elect to receive goods and passengers at Pueblo from the Rio Grande Company, and to deliver to that corporation alone, other conditions may be added, as that the goods shall be brought in wagons and the passengers on horseback. What right has the defendant to say that goods or passengers shall come to it in one way or the other? Or that goods and passengers carried by it shall be carried to other points beyond its terminus by one company only? The answer of defendant is that such arbitrary distinctions are profitable to it, and therefore lawful. Its first duty is to its stockholders, and anything that will bring money to its exchequer is permissible. In the courts a different view of the subject prevails. Twells v. Penn. R. Co., is a case decided in the Supreme Court of Pennsylvania, for which the reporter of that court was probably unable to find space in the regular series of reports. The case may not be of interest to the corporations of that State. The opinion is, however, printed in 3 Am. Law Reg. (N. S.) 728, and as it is cited by the court in later cases, it seems to be authentic. Defendant's road extended from Pittsburg to Philadelphia, and it had arranged with some other road to carry from Philadelphia to New York, so that it was able to carry through to the latter place from points on its own line. By raising the local rate between Pittsburg and Philadelphia defendant sought to compel shippers to patronize its through line. As the question is stated by the court, defendant said to plaintiff, "Employ us to carry your oil, not only over our road to Philadelphia, but thence to New York. If you do not, we will exact from you, for its carriage to Philadelphia six cents per hundred pounds more than we demand from all others who employ us to transport similar freight only to Philadelphia, or, if you employ us to carry it to New York. after it shall have reached Philadelphia, we will carry it to Philadelphia for six cents less per hundred pounds than we are accustomed to charge others for similar transportation." And the court then adds, "No one will maintain that they can lawfully make such a stipulation for the benefit of a third party, *e. g.*, one of two other carriers. They can not say to a shipper at Pittsburg of any domestic product, "You have freight destined to New York. You must send it over our road to Philadelphia. If, when it arrives there, you will forward it by A to New York, we will carry it over our line at certain rates. If you send it by any other than A our charges will be higher." This is a discrimination that can not be allowed. Conceding it, would put in the power of the defendants a monopoly of the carriage of all articles which pass over their road from either terminus to every place of final delivery. The oppressive effects of such a rule are the same, whether its motive be to benefit third parties or the railroad company itself. Of transportation along the line of their road the defendants practically have a monopoly. It is not consistent with the public interests, or with common right, that they should be permitted so to use it as to secure to themselves superior and exclusive advantages on other lines of transportation beyond the ends of their road." The court cites Baxendale v. Great Western R. Co., 1 Neville & McNamara, 191, which clearly supports the view expressed. That case is said to be reported in 5 C. B. (N. S.) 309, and other English books, as in Neville & McNamara.

So also a carrier can not refuse to receive a passenger on the ground that his coach connects with another which extends the line to another place and he has agreed with the proprietors of such other coach that he will not receive passengers from such place, unless they come in his coach. Bennett v. Dutton, 10 N. H. 481. On the same principle a railroad company can not elect to deliver grain at one warehouse on the line of its road to the exclusion of other warehouses; Chicago, etc. R. Co. v. People, 56 Ill. 365; or to deal with one express company to the exclusion of other express companies. Sanford v. P. R., 24 Pa. St. 378; New England Express Co. v. Maine Central R. Co., 57 Me. 188. These cases are sufficient to show the great weight of authority in support of the rule as stated, that a carrier can not hamper or limit his duty to the public except in matters essential to the service.

The opposite view has secured recognition from some eminent judges, as in Jenicks v. Coleman, 2 Sumner, 221, but great names do not prevail against great principles and should not be allowed to do so in this instance.

In all that has been said the right of the defendant to arrange with the Rio Grande Company for a through line to Denver and elsewhere, and to carry its connection with that company has not been impugned. We recognize the authority of railroad companies to unite in continuous lines for greater facilities in the transportation of passengers and freight, as established in numerous cases. In fact, the constitutional provision, to which we shall presently refer, seems to demand such union. But we maintain the right of travelers and shippers of goods to choose between rival lines of railroads without let or hindrance from the latter. We deny the power of a railroad company in the use of its own road by discriminating charges or other arbitrary measures, to compel the public to resort to any other road, or adopt any particular course in the transmission of goods or passengers. This proposition stands with the general rule be-

fore mentioned, that carriers shall not limit or trammel with arbitrary distinctions the service to be rendered; that all roads shall be open to wholesome competition, as declared in the cases in Fourth and Fifth Denio; and with the doctrine that the carrier shall follow the instructions of his patrons, to the extent of forfeiting his earnings in case of disobedience. Robinson v. Baker, 5 Cush. 137. We hold, therefore, that defendant is bound to give to complainant reasonable facilities for the exchange of passengers and freight at Pueblo as to all who desire to use complainant's line in connection with its own, and for the price of carriage charged to persons who use the Rio Grande road in connection with defendants. There is some difficulty in deciding what such facilities shall be. On demurrer to the bill we had occasion to consider the meaning of section 4, article 15, of the Constitution, which declares the right of every railroad to connect with any other railroad, and we arrived at the conclusion that the connection mentioned in the Constitution is of a business character involving the interchange of passengers and freight in the manner usual and customary between railroads throughout the country. Objection is now made that the clause referred to is authority to the legislature to pass laws on the subject, but otherwise incapable of enforcement. We have not maintained that the physical connection of tracks provided for could be made without a law to direct the course of proceeding. In this case it is conceded that the roads are united, and the question is whether any use shall be made of the connection. And we shall not attempt to point out the course of legislation or the limits to which it may extend under that section. Independently of legislative power and action, the clause conveys to us the idea that railroads in this State are to be operated in conjunction for the convenience of the public, at least to the extent usual and customary between connecting lines in the control of companies not hostile to each other. What more may remain for the consideration and judgment of the legislative assembly we are not concerned to know. "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced." Cooley's Con. Lim. 101.

Within this rule the section is obligatory on railroads to the extent indicated, if no further.

It is also objected that this construction of the section brings it into conflict with section 8, article 1 of the Constitution of the United States, which confers on Congress the power "to regulate commerce with foreign nations and among the several States." The clause referred to directs what shall be done within the State for the advantage of the people of the State. Whatever the effect may be on inter-State commerce until Congress shall act on the subject, such regulation is within the authority of the State. Munn v. Illinois, 4 Otto, 113; Peik v. Chicago, etc. R. Co., Ib. 164.

Many witnesses in the service of prominent railway companies were examined as to the course of business between railway companies in the United States in forming continuous lines and sending freight and passengers over connecting roads. The greater number concur in the statement that such arrangements are the subject of special agreement, as to which the corporations interested claim and exercise the absolute authority of natural persons in the daily affairs of business. The evidence discloses what is fully known to all who have given any attention to the subject, that, as to business intercourse, railway companies assume to be absolutely independent of each other. In the strife of competition it is not strange that each should assume to have authority in all things—and yet they do not absolutely refuse to take passengers and freight from each other. In Bennett v. Dutton, 10 N. H., in 1837, when the carrying business was young, defendant refused to take plaintiff in his coach because the latter had been guilty of riding in a rival coach. But now the managers of railroads are too wise in the law to make such blunders. By discriminating charges, business may be sent in one way or another to avoid a rival line as well as by refusing to deliver to such line. An illustration—not given in the evidence, but within the knowledge of many persons in this community—may be recalled. Not many years ago the Union Pacific road and the Denver Pacific road were in the control of companies hostile to each other. They did not refuse absolutely to deliver freight and passengers to each other, but they could not agree in the rates to be charged by each company, and goods from California, consigned to Denver, were carried by Cheyenne to Omaha, 600 miles east of Denver, and then to Kansas City, 200 miles south, and back to Denver, 639 miles. This circuit of more than 1,400 miles was made to avoid the use of the Denver Pacific road from Cheyenne to Denver, a distance of 110 miles, or something like that. If railway companies impose such onerous burdens on the public, it must not be supposed that they have authority or law for it. Returning to the evidence, it sufficiently shows that passengers and freight are freely exchanged between the connecting railroads in most cases. This is the rule, and the exception arises when one of the parties conceives that it can make more money by some other course. Obstacles are then made to the continuance of friendly relations in the way of discriminating charges and the like, and the companies become hostile to each other. Now, the right of railroad companies to raise such obstacles, in their own interest and against the public interest, is the very matter in issue in this cause. We have endeavored to show that they have no such right, and if we have succeeded, the practice itself is not now in the way of granting relief in this cause. If that has not been shown, further discussion will not avail.

We perceive that there is a difficulty in setting up these companies to be agents, each for the

other, in the sale of tickets for passage over both lines, and for making through contracts binding on both companies for the transportation of goods. But some things may be done without making either company an agent for the other, and without bringing the companies into any relation of contract or agreement as between them. Passengers and their baggage may be delivered at the junction of the roads by each company, to be transported by the other, and goods may be forwarded in car-load lots and otherwise on terms that will not involve any contract made by one of these companies for and on behalf of the other. The defendant accepting the services of other railroad companies in selling through tickets and making through contracts over its own line, in connection with the Rio Grande road, ought not to object to the same company's performing the same service for complainant if they are willing to do so; nor should defendant be heard to say that it will not carry goods or passengers on the ground that they are to be carried further by complainant from defendant's terminus to some other point. It is, however, unnecessary to discuss in detail the relief to be granted, as that can be well enough expressed in the decree. In this opinion we seek only to define the general rule.

The decree will be for the complainant, but not to the full extent of the prayer of the bill.

McCRARY, circuit judge, concurs.

CONSTITUTIONAL LAW—RAILROAD COMMISSION — DELEGATION OF LEGISLATIVE POWER.

GEORGIA RAILROAD AND BANKING CO. v. SMITH.

Supreme Court of Georgia, February 27, 1883.

1. Where the Constitution of a State authorizes the General Assembly to regulate railroad freight and passenger tariffs and to prevent unjust discrimination and to require reasonable and just rates of freight and passenger tariff, a law passed by such assembly establishing a board of railroad commissioners and authorizing them to make reasonable and just rates of freight and passenger tariff, of which a schedule should be made for each railroad in the State, and providing adequate penalties for the enforcement of the rules and regulations of such commission, such an act will not be regarded as unconstitutional as a delegation of legislative powers.

2. Where the charter of a railroad corporation, which grants the company exclusive privileges, establishes a maximum freight and passenger rate, such a provision does not, in view of the maxim which requires a strict construction of a charter granting exclusive privileges, confer upon such railroad company a *vested right* to charge any rate less than such maximum, and an act establishing a railroad commission and authorizing them to establish a schedule of freight and passenger rates, and requiring all railroad companies to conform thereto, does not impair the obligation of any contract contained in such charter.

CRAWFORD, J., delivered the opinion of the court:

The Georgia railroad and banking company, denying the power of the railroad commission of the State of Georgia to regulate freight and passenger tariffs over its road, has filed this bill that the right of the said commission to exercise this power may be judicially determined.

This power is denied: 1. Because by art. 4, sec. 2, par. 1 of the Constitution of Georgia, the duty is imposed on the General Assembly to regulate freight and passenger tariffs. 2. Because the act of October 14, 1879, is unconstitutional and void as being an attempt to delegate legislative powers to said railroad commission. And because it is in conflict with the Constitution of Georgia, which forbids the imposing of excessive fines or inflicting unusual punishments. 3. Because the charter of said company is a contract between the State and the company, by which the company has the right to charge any rates of freight and passenger tariffs not exceeding those limited by its charter; whereas, the said commission, under the authority given it by the act of October 14, 1879, forbids the said company, under heavy penalties, from charging the rates allowed by said contract. Wherefore, the said act is, by virtue of par. 1, sec. 10, art. 1, of the Constitution of the United States, which prohibits the States from passing any law impairing the obligations of a contract, unconstitutional, null and void.

The prayer of the bill is: 1. That the act of October 14, 1879, be declared null and void. 2. That it be declared inoperative against the Georgia Railroad and Banking Company. 3. That the said commission be perpetually enjoined from prescribing rates of fare and freight over the Georgia railroad and its branches, or in any manner enforcing against it the provisions of the said act of October 14, 1879. 4. For general relief.

The chancellor below, after considering the bill and exhibits of complainant, and cross-bill and exhibits of defendants, refused the injunction prayed for, and that refusal is assigned as error. The questions to be determined by this litigation are: 1. Whether the act establishing the Railroad Commission of the State of Georgia with its powers and duties is not unconstitutional and void, because it is the duty of the legislature under the Constitution to regulate freights and passenger tariffs, and this act seeks to delegate this power to the said commission. 2. Whether the said act, in so far as it attempts to interfere with the chartered rights of the Georgia Railroad and Banking Company, does not violate that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts.

The Constitution of 1877 confers upon the legislature the power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations and requiring reasonable and just rates of freight and passenger tariffs. It further makes it the duty of the legislature to pass

laws from time to time to carry into effect the constitutional provision and to enforce the same by adequate penalties. For this purpose and to this end was the act under consideration passed. It declares, among other things, substantially, that if any railroad doing business in this State shall charge, collect, demand or receive more than a fair and reasonable toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, the same shall be deemed guilty of extortion, and, upon conviction, dealt with as by the said act provided.

In order that fair and reasonable tolls and compensation for the transportation of passengers and freight might be certainly had, it was also provided that there should be three railroad commissioners appointed, whose duty it should be to make reasonable and just rates of freight and passenger tariffs, to be observed by all the railroad companies doing business in the State on the railroads thereof. And that a schedule of such rates should be made for each railroad doing business in the State, which said schedule should be deemed and taken in all the courts of the State as sufficient evidence that the rates were just and reasonable charges for the transportation of passengers and freights and cars upon the railroads in all cases brought against any road involving unjust discriminations or improper charges. Adequate penalties were likewise provided for the enforcement of the rules and regulations of the said commission, for the establishing of reasonable and just rates to be observed by the railroad companies. Thus it appears that the Constitution provided that the legislature should have power to regulate the railroad freights and passenger tariffs, and to require reasonable and just rates for both; that it made it also the duty of the legislature to pass laws necessary for its execution, and that in pursuance of that duty, the law complained of was passed.

The object of the constitutional provision and the legislative enactment, was to give proper protection to the citizens against unjust rates for the transportation of freight and passengers over the railroads of the State, and to prevent unjust discrimination, even though the rates might be just. It was not expected that the legislature should do more than to pass laws to accomplish the ends in view. When this was done its duty had been discharged. All laws are carried into execution by officers appointed for that purpose, some with more, others with less, but all must be clothed with power sufficient for the effectual execution of the law to be enforced.

Legislative grants of power to the officers of the law to make rules and regulations which are to have the force and effect of laws, are by no means uncommon in the history of our legislation. I need only mention the power given to the judges of the Supreme and Superior Courts of this State to establish rules which, if not in conflict with the Constitution of the United States, of this State or the laws thereof, are binding and must be obeyed. And it has never been claimed that they were unconstitutional because they had not been passed by the legislature and read three times and on three separate days in each house of the General Assembly.

The act of October 14, 1879, provides that fair and reasonable rates only shall be charged by the railroads of the State. Did the constitutional convention by par. 1, sec. 2, art. 4, intend more than the passage of a general law, such as this, to carry into effect the clause here referred to? It certainly was not contemplated that the details of rates to be fixed over the many miles of railroads in the State should be settled and determined by the legislature. The many influences that combine to cause changes in the ever-varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing by the legislature just and proper schedules for the various railroads, with their differences of length, locality and business, appears to us to be so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so when it is remembered that schedules just and right when arranged for the months of winter, might be ruinously unjust and wrong for the months of summer; or that such as were proper for the year of the meeting of the General Assembly might the succeeding year bankrupt every railroad corporation in the State.

In our judgment the act creating the railroad commission is not unconstitutional and void. That it may need amendments is more probable; indeed, an experiment so new and untried would be exceptional if it were perfect in its very inception. The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great, and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted. The former would be unconstitutional, whilst the latter would not. 91 Ill. 357; Tilly v. Savannah, etc. R. Co., and cases cited; pamphlet dec. Georgia, September Term, 1880; 94 U. S. 113, 155, 164.

2. The next question made by the record is, whether the act of October 14, 1879, violates the chartered right of the stockholders of the Georgia Railroad and Banking Company, as contained in the twelfth section of the act of incorporation. That clause is as follows: "That the said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents per mile for each pas-

senger; *Provided*, always, that the said company may, at any time when they see fit, rent, or farm out all, or any, of their said exclusive right of transportation or conveyance of person on the railroad or railroads, with the privilege to any individual, or individuals, or other company, and for such term as may be agreed upon, subject to the rates above mentioned." Acts of 1833, p. 262.

It is well settled that the charters of incorporated companies, granting exclusive privileges to the corporators, are always to be strictly construed, and that whatever is not expressly given therein, or not necessarily implied therefrom, is withheld. In support of this rule of law, we quote from the case of Commonwealth v. Erie & Northeast R. Co., 27 Pa. St. 339. Black, C. J., in rendering the judgment of the court, said: "That which a company is authorized to do by its act of incorporation it may do; beyond that all its acts are illegal. And the power must be given in plain words, or by necessary implication. All powers not given in this direct and unmistakeable manner are withheld. * * * * In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist, because whatever is doubtful is decisively against the corporation." And again is the rule clearly and forcibly stated in the case of Fertilizer Co. v. Hyde Park, 97 U. S. 659. Swayne, J., said: "The rule of construction in this class of cases is, that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakeable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Guided by these authorities let us see whether the 12th section of this charter can stand the test prescribed, and give to the company what it claims. It was incorporated "to construct a rail or turnpike road," and, after providing for its organization, conferring upon it the right to cross the public roads and bridge the rivers and watercourses, and giving it the right of way, etc., the act then proceeds to declare the special rights to be enjoyed. These were that the company should "at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads, to be by them constructed while they see fit to exercise the exclusive right."

The exclusive right here granted was to be enjoyed only upon one condition, and that was that the company should not charge more than fifty cents per hundred pounds on heavy freight, and five cents a mile for every passenger transported over the road. The legislature was dealing with the subject-matter of a public highway, and public highways had, theretofore, been open to the free use of all persons for travel, for the transportation of goods and the conveyance of passengers without the payment of tolls or charges. To deny the use of a public highway to the people at large, and give it to an incorporated company for its exclusive use to convey passengers and freights was deemed an extraordinary privilege; and this extraordinary privilege the legislature agreed to grant to the company, provided it would not charge more than the above rates. Or, to put it in the form of a contract, it was agreed by the State that this company might build the road, and so long as it carried freight and passengers as prescribed by its charter, it should not in any wise be used by the public, but by the company exclusively.

Under no reasonable construction of this charter can it be claimed that the State contracted with the company to guarantee to it the exclusive right to charge the full amount of the maximum rates or, indeed, any rate so long as it does not exceed them. It can only be construed to mean that, so long as the specified maximum of rates were not exceeded, the company or its lessee should have the exclusive right to carry freight and passengers over the road. This seems to us to be the unquestionable meaning of the words used; but, even if this be doubtful, "whatever is doubtful is decisively against the corporation." Besides, we hardly think it will be denied that the State has the power to regulate the rates of freight and passenger fare upon railroads, unless that right has been clearly parted with in granting their charters. Indeed, the words of the charter parting with this right by the State must amount to a positive contract. In the case of the Charles River Bridge Co. v. Warren Bridge Co., 11 Pet. 544, Taney, C. J., in pronouncing the judgment of the court, said that it was "necessary to show that the legislature contracted not to do the act of which complaint is made. * * * * The inquiry then is, does the charter contain such a doctrine on the part of the State? Is there any such stipulation to be found in the instrument? * * * If a contract on that subject can be gathered from the charter, it must be by implication, and can not be found in the words. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter by their natural and proper construction purport to convey. There are no words which import such a contract, and none can be implied." See also 49 Ga. 151; 50 Id. 620; 40 Eng. C. L. 298, 319; 42 Id. 496; 46 Id. 234-5.

Applying these rules of law to the charter under consideration, can it be said that there is a clear contract, either express or necessarily implied, that the company should have the absolute

right to regulate its rates and fares, and that the State will guarantee to them that right up to the maximum sums named in the charter. Such a contract can not be found in the words "and in charters of this description no rights are to be taken from the public or given to a corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey."

The natural and proper construction of the words used is, that the State stipulates upon certain terms not to interfere with the company's exclusive right of transportation. This was all. It nowhere stipulated not to interfere with its rates. And to bind the State it must be shown that it contracted with the company that it would not thus interfere.

Let us inquire, then, how does the act complained of deprive the road of its exclusive right to convey passengers or freight? By what paragraph therein is the road opened to the public? The answers are obvious; there is not a line to be found in it that deprives the corporators of the exclusive use of the road as against everybody. Hence the learned and able counsel for the railroad, to maintain their position, were compelled in their construction to insist that the word, exclusive, in the 12th section of the charter, should be stricken out, or, at least, that no special significance should be given to it. Where, we ask, is there authority in any court when construing the grant of a chartered law and power to a corporation, to strike out or weaken the force of any word whatever, so as to enlarge the meaning, or cover what it would not cover if it remained therein? We know of no such authority, and none such has been or can be shown for this.

It is claimed by the company that the proviso makes the contract between it and the State. But before this can be construed into a contract, such as is contended for, it would be necessary to insert the words therein which are not used, and to make that a covenant in which no words of covenant appear. The construction contended for is, we think, unauthorized and violative of the rules as to what constitutes the usual office of a proviso. See 15 Pet. 423; 1 Barn. & Ad. 99; Comyns Dig., "Condition" (A. 2), vol. 3; Coke on Littleton, 203, b; Bouvier's L. Dic., "Proviso," 399.

It may not be out of place, in concluding this opinion, to say that whilst we hold the act of Oct. 14, 1879, constitutional and the orders of the commissioners valid and binding, yet, we are not to be understood as holding that their powers are unlimited or beyond legal control by the proper authorities of the State. On the contrary, we hold that the powers which have been conferred on them are to be exercised within legal and constitutional limitations, and in such way as not to invade the legal and constitutional rights of others. If, therefore, the case made by the complainant against the commissioners had shown a violation of the chartered rights of the company, it would have been the duty of this court, by proper order and decree, to have restrained and enjoined them from such violations. All grants of power are to be exercised only in conformity to the Constitutions of the State and Federal government, and the laws passed in pursuance thereof.

Judgment affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. APPEAL—FINAL DECREE.

A decree is final for the purposes of an appeal when it terminates the litigation between the parties on merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. In a suit brought by an express company against a railway company, the controversy being about the right of the express company to require the railway company to do the express company's business on the payment of lawful charges, where the decree in effect requires the railway company to carry for reasonable rates, and fixes for the time being the maximum of what will be reasonable, *held*, a final decree and appealable, notwithstanding a supplemental order relating to settlements of accounts was made after entry of the decree. *St. Louis, etc. R. Co. v. So. Exp. Co.* U. S. S. C., Jan. 29, 1883; 2 Sup. Ct. Rep. 6.

2. APPEAL—FINAL DECREE — DIMINUTION OF RECORD—CERTIORARI.

A reference to the master to "take and state an account between the parties as to the compensation that should be and has been paid during the litigation, and up to the final termination thereof," and entered before or at the time of the decree from which the appeal was taken, does not affect the finality of the decree. Where, upon the face of this decree, it appears that the case was disposed of on demurrer to the bill, the evidence on file is not necessary for the hearing of the appeal; but where the record has not been printed in full, and the parties do not agree in their statements as to what it contains, *certiorari* may be granted reserving all other questions till return is made. *Missouri, etc. R. Co. v. Dinsmore*, U. S. S. C., Jan. 29, 1883; 2 Sup. Ct. Rep. 9.

3. APPELLATE PRACTICE—WAIVER OF ERRORS—ESTOPPEL.

No waiver or release of error, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree which it is sought to bring into review. The fact that the plaintiff in error had accepted the amount awarded in the decree brought up by writ of error, does not estop him from prosecuting the writ of error and procuring a reversal of the decree. *Embry v. Palmer*, U. S. S. C., Jan. 29. 1883; 2 Sup. Ct. Rep. 25.

4. BANKRUPTCY—SUIT BY ASSIGNEE—LIMITATION.
Where a judgment in a State court is rendered against one who is shortly thereafter declared to be a bankrupt, a writ of error to that judgment, sued out by the assignee, is a suit brought by such assignee, within the meaning of sec. 5057 of the Revised Statutes. The limitation of time in that section applies to suits by the assignee to recover debts and moneyed obligations, as well as to controversies concerning adverse interests in property, more strictly speaking. *Jenkins v. International Bank*, U. S. S. C., Jan. 29, 1883; 2 Sup. Ct. Rep. 1.

5. CONTRACT—CONSIDERATION— FORBEARANCE TO SUE.
Where forbearance is relied on as the consideration of a promise, the proof must show more than that it was followed by forbearance. It must appear not only that the promise was made for the purpose of obtaining time, and that time was actually given, but also that the indulgence thus accorded was in pursuance of the request implied by the promise. *Edgerton v. Weaver*, S. C. Ill., Nov. 20, 1882; 105 Ill. 43.

6. CONTRACT—UNDUE INFLUENCE—EVIDENCE.
1. Whatever destroys free agency, and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of physical or mental coercion. 2. Undue influence is not measured by degree or extent, but by its effect. 3. When a deed is attacked on the ground of want of capacity in the grantor, the test is, did the grantor possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing? 4. A witness is not entitled to credit, whose testimony is inconsistent with the common principles by which the conduct of mankind is usually governed. *Earle v. Norfolk and New Brunswick Hosiery Co.*, N. J. Ch. Ct.; 36 N. J. Eq. 188.

7. CONVEYANCE—MORTGAGE—PRIORITY OVER UNRECORDED DEED.
A recorded mortgage of the widow's interest in real estate of which the husband died seized, takes precedence of a prior unrecorded deed made by the husband and wife in his lifetime, and of which the mortgagee had no notice. *Ferry v. Burnell*, U. S. C. C., D. Kan., January 8, 1883; 14 Fed. Rep. 807.

8. CRIMINAL LAW—MURDER—ARREST WITHOUT WARRANT.
Where an officer of the law attempts to arrest a person, without warrant, and seizes hold of the person or his bridle reins, the officer being unknown to the person, the right of self-defence exists, and the killing of the assailant may be justifiable in law, or may be, according to circumstances, murder in the first or second degree. *State v. Johnson*, S. C. Mo., Oct. Term, 1882.

9. DIVORCE—ALIMONY—WIFE'S SEPARATE PROPERTY.
1. Alimony and counsel fees were originally allowed in divorce suits, because the wife was without other means of support, or of obtaining the money necessary to defray her expenses in the suit. 2. When the wife has sufficient separate property, the reason for giving her either temporary alimony, or money to defray her expenses in the suit, does not exist, and she is not entitled to either. *Westerfield v. Westerfield*, N. J. Ch. Ct.; 36 N. J. Eq. 195.

10. EVIDENCE — CORPORATION — SUBPŒNA DUCES TECUM—SUIT BETWEEN THIRD PARTIES.
The officers of a corporation can be compelled by a *subpœna duces tecum* to produce books and papers of the corporation in a suit in equity to which the corporation is not a party, upon the application of one of the parties to the suit. *Wertheimer v. Continental Ry. & Trust Co.*, U. S. C. C., S. D. N. Y., Feb. 19, 1883; 15 Rep. 294.

11. FEDERAL SUPREME COURT—FEDERAL QUESTION.
Where the Supreme Court of Errors of a State failed to give to a judgment of the Supreme Court of the District of Columbia its due effect, a question is presented which may be brought before this court on appeal, or by writ of error. *Embry v. Palmer*, U. S. S. C., Jan. 29, 1883; 2 Sup. Ct. Rep. 25.

12. FIXTURE—PORTABLE FURNACE IN CHURCH—MORTGAGOR AND MORTGAGEE.
A portable iron furnace for heating a church, standing on the cellar floor, and held in position by its own weight, and capable of being detached, and also its pipes, etc., without injury to the building, is not, as between mortgagor and mortgagee, a fixture. *Rahway Sav. Trust v. Irving St. Baptist Church*, N. J. Ch. Ct., 36 N. J. Eq. 61.

13. FRAUDULENT CONVEYANCE—JUDGMENT—INNOCENT PURCHASER FOR VALUE.
A conveyance of lands in this State by a husband and wife to the husband's brother-in-law, was sustained against a judgment creditor of the wife on a judgment recovered in another State for her tort, where it appeared that the grantee was entirely ignorant of such judgment, and bought the lands, as he had been often importuned to do, at the request of the grantors, because of their inability to pay the taxes, assessments and encumbrances on the lands, although the grantee knew nothing about the property, had never seen it, and relied upon the grantor's statements as to the title, value and encumbrances. *Mathiez v. Day*, N. J. Ch. Ct.; 36 N. J. Eq. 88.

14. NEGLIGENCE—MASTER AND SERVANT—FELLOW-SERVANT.
The injury complained of occurred on account of the unskilful, improper and negligent manner in which defendant had constructed its railroad, whereby a construction train ran off the track. Plaintiff was employed in leveling and working on the track, and received the injury in going on the construction train to the place where he was engaged in work. *Held*, conceding that plaintiff and the engineer of the train were fellow-servants in the same general business, plaintiff did not assume the risk arising from the unskilful, improper and negligent manner in which defendant's road was constructed. *Trask v. Cal. So. R. Co.*, S. C. Cal., Jan. 26, 1883; 10 Pac. C. L. J. 722.

15. PENSION—CLAIM FOR DOUBLE PENSION.
Where relator surrendered to the proper authorities his pension certificate issued to him under a special act of Congress, and elects to receive a greater pension under a subsequent general pension law, he can not thereafter demand his pension under the special pension act passed in his personal behalf. *United States v. Teller*, U. S. S. C., Jan. 29, 1883; 2 Sup. Ct. Rep. 39.

16. WILL—BEQUEST OF PRIVILEGE IN HOUSE TO WIDOW.
A bequest to the widow of the testator was as fol-

lows: "It is my wish that my wife Margaret shall have the privilege of occupying so much of the house in which I now live as she may need during the time she remains my widow." *Held*, that the bequest was a personal privilege to the widow, and could not be transferred to a stranger, by lease or otherwise. *Ingersoll v. Ingersoll*, N. J. Ch. Ct., October Term, 1882; 15 Rep. 184.

17. WILL—UNDUE INFLUENCE—EVIDENCE.
1. Though fraud in procuring a will may be inferred, the inference can not be lawfully drawn unless it is natural and necessary. And the court will refuse to impute fraud when the evidence does not necessitate a belief in its existence. 2. In this case a mother gave all her property, with comparatively small exceptions, to one of her two sons. It appeared that she was of sound mind, and that when she made the will she harbored resentment against the other son, arising out of a business transaction between him and her. The son to whom she gave almost all her estate was on confidential terms with her, and acted as her amanuensis in giving instructions for the will, and aided her in obtaining the will from her lawyer, after it was drawn, to be executed. There was no evidence of threats, restraint or coercion of any kind, nor even of importunity or persuasion to induce her to make the will. *Held*, that there was in the case no evidence of testamentary incapacity, nor any evidence of undue influence, and (reversing the decree of the orphans' court) that the will must be admitted to probate. *Dale v. Dale*, N. J. Prerogative Court, October Term, 1882; 36 N. J. Eq., 269.

18. WILL—UNDUE INFLUENCE—SPIRITUALISM.
Where a testator embraced spiritualism as practiced by his beneficiary, who claimed to be a spirit-medium, and instead of merely believing in it as an abstract proposition, the testator became possessed of it and suffered it to dominate his life, and where his belief in spiritualism was artfully used by his beneficiary to alienate him from his only son and child and to get his property, *held*, that a will made in such a mental condition and under such influences should be set aside. *Thompson v. Hawks*, U. S. C. C., D. Ind., January, 1883; 14 Fed. Rep., 902.

RECENT LEGAL LITERATURK.

LAWYER'S REFERENCE MANUAL. The Lawyer's Reference Manual of Law Books and Citations. By Charles C. Soule. Boston, 1883: Soule & Bugbee.

No topic connected with the study of law is so much neglected as legal bibliography. This fact is evidenced by the all but universal difficulty of practitioners, not only in ferreting out blind abbreviations, but in many instances, in deciphering the meaning of unusual though perfectly regular citations. For the neophyte, the system of abbreviations used is a wilderness of snares and pitfalls, and much of the valuable time of his apprenticeship is absorbed in learning to thread its mazes with any sort of confidence and practical success. Nor, indeed, is ignorance upon this important practical topic confined to the earlier years of professional life. An examination of the briefs filed by counsel, or, in many instances, of the opinions of many of the judges before they have been subjected to the revision of the reporters, will convince any one who doubts the accuracy of this statement. Nor is the evil of such slight importance as it might at first seem, for the ever-increasing multitude of law books, increases at once the necessity for accuracy and the danger of being inaccurate. In view of these facts, and the importance of such practical aids in the labor of legal research, it is a singular circumstance that the profession should have so long been without any work on legal bibliography which could make any legitimate claim to being at once practical and comprehensive. Heretofore the investigator was compelled to resort to the catalogues of libraries or of particular firms of publishers and booksellers, or to partial lists of abbreviations in the back of some elementary work, all more or less incomplete. The volume before us, however, covers the whole ground of the practical phase of legal bibliography, and comprehends: "1. A List of American Reports, Digests and Statutes, with brief notes in regard to editions and peculiarities; 2. A List of the English, Irish, Scotch and British Colonial Reports, with notes. The abbreviations recommended in these two parts are such as seem to be at the same time the shortest and most definite for the use of an American lawyer. 3. An Index of Authors, etc., which serves both as an index to the proper names in the first two parts and as an original list of short titles of the principal law journals, and of the elementary works now in use or often cited. The dates given are those of the copyright entry of the last editions. 4. An Index of subjects covering the elementary works and periodicals in part 3. 5. An Index of abbreviations, intended to cover not only such as have been indicated as correct in the first two parts, but also others, whether common or uncommon, correct or incorrect, which have been noted by the compiler in reports, digests, text-books or briefs."

The work bears evidence in every part of most careful and conscientious labor, and we think is well-adapted to supply the need which the author says that, during his seventeen years experience as a law-bookseller, he has heard most frequently expressed by lawyers, for a convenient desk-book to give thorough, but condensed, information about reports and text-books, together with a practical index to abbreviations. It seems to us that Mr. Soule's business experience has pointed out to him one of the practical needs of the profession, and his patience and laborious research have enabled him to most admirably supply it.

The mechanical execution is all that could be desired. The paper and typography are excellent, and the binding is the very handsome half-calf which is characteristic of many of the volumes issued by this enterprising firm, the rich effect of which is such a pleasant contrast to the law sheep so much in vogue.

BOUVIER'S LAW DICTIONARY. A Law Dictionary, adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union, with references to the civil and other systems of Foreign Law. By John Bouvier. Fifteenth Edition, thoroughly Revised and Greatly Enlarged. Two volumes. Philadelphia, 1883: J. B. Lippincott & Co.

This standard work has been too long favorably known to the legal profession to require special description or commendation. The fact that the name of the editor, Francis Rawle, Esq., of the present edition is singularly enough omitted from the title page, would seem to indicate that it was simply a substantial reprint of the original edition of the distinguished author. On the contrary, however, it appears both from the advertisement of the publishers and the preface of the editor, that the work has been much enlarged, containing "three times the matter of the original edition," many of the titles being thoroughly revised and rewritten, and many others are entirely new. As to the necessity and value of the new matter and the skill with which both new and old are welded into one symetrical whole, there can not be two opinions. Altogether the work is admirable, and will, we fancy, be found indispensable to the studious lawyer who desires to avail himself of the most practical assistance in his labors. One blemish should, we think, be noted. This edition follows the earlier ones in citing cases simply by the number of volume and page, omitting the names of the parties. This plan, which was much more in vogue at the time the original edition was published, has latterly been abandoned by the more accurate and painstaking of legal writers, experience having shown that it was practically an impossibility to prevent numerous errors creeping into such citations. The mechanical execution is fair.

NOTES.

——A lawyer defended a negro for stealing a cow from a butcher, and cleared his client upon pure technical defenses. His fee of $25 not being paid, he threatened to have the case "reopened," in which event, he mildly suggested, "it will go very hard with you." The frightened negro agreed to pay early the next morning, and sure enough did so. Later in the day, however, the lawyer missed his own cow, and upon inquiry found that it had been stolen by his client and sold to the butcher aforesaid, for $25. He stated the facts to the butcher, and demanded his cow. The butcher said: "No! but give me my money and I will give you your cow." The lawyer proposed to argue "the law point," but the butcher declared that technicalities should not prevail in his court, and immediately adjourned *sine die*. He still holds the cow.

——There was a bailie in Glasgow who often astonished the audience in the police court by his use or abuse of the English language. All persons whose cases required more attention he ordered to be "reprimanded" (remanded) until next day or some further day. It was the same worthy magistrate who occassionally addressed abandoned offenders by solemnly telling them that henceforth they must be careful of their conduct, as "the eye of the Almighty and the Glasgow police would be on them." Remembering the formality he had witnessed at a circuit court recently held, the same functionary, in sentencing a man to sixty days' imprisonment, put on his cocked hat, and solemnly uncovering his head, implored a blessing on the culprit's soul.—*Scottish Law Magazine.*

——In one of the townships in Preble county, Ohio, a new justice of the peace was recently elected, his honesty being considered perhaps more than his legal attainments. At the first trial before him, both plaintiff and defendant were represented by young law students, not yet admitted to the bar. The evidence being all in, the cause was argued before the jury by the lawyers, who at the close asked the court to charge the jury. There had been many things in the conduct of the trial that were calculated to puzzle the justice, but this more than all else. It was a real poser. He tried to excuse himself, saying he did not think it proper at that time; but the lawyers were inexorable and demanded a charge. The justice took up "Swan's Treatise," and after turning slowly through the first part of the book, he paused. He read and reread, and then poising himself as a man who goes into battle with right on his side, and the evidence on hand to prove it, said: "Gentlemen of the jury, your charges in this case will be one dollar and mileage each way, and the other charges I will make out after the trial." This was the only jury charge in Swan, and that book was made especially for justices.

——Even a prosaic law office has sometimes its poesy. A subscriber to the *Daily Register* received yesterday from a client, for whom he had searched a title, a check accompanied by the following note:

> After waiting almost a year,
> I think it is time that you should hear
> About some cash to pay my bill.
> Accept my check and my good will.

The attorney answered promptly:

> Your handsome check has been received,
> At which I have felt much relieved;
> Though never doubting you would pay,
> I let you have your own sweet way.
> When property again you buy,
> Let me the search of title try.